

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA  
3 BEFORE THE HONORABLE PEGGY A. LEEN, MAGISTRATE JUDGE

4 ORACLE USA, INC., a Colorado :  
5 corporation; ORACLE AMERICA, :  
6 INC., a Delaware corporation; :  
7 and ORACLE INTERNATIONAL : No. 2:10-cv-0106-LRH-PAL  
8 CORPORATION, a California :  
9 corporation, :  
10 Plaintiffs, :  
11 vs. :  
12 RIMINI STREET, INC., a Nevada :  
13 corporation; and SETH RAVIN, an :  
14 individual, :  
15 Defendants. :  
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17 TRANSCRIPT OF MOTION HEARING

18 September 10, 2010

19 Las Vegas, Nevada

20 FTR No. 3B/20100910 @ 9:09 a.m.

21  
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1                                   A P P E A R A N C E S (Continued)

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1 LAS VEGAS, NEVADA, SEPTEMBER 10, 2010, 9:09 A.M.

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3 P R O C E E D I N G S

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5 COURTROOM ADMINISTRATOR: We are back on record.

6 We are now calling the hearing in the matter of  
7 Oracle, USA., Inc., et al., versus Rimini Street, Inc., et  
8 al. The case number is 2:10-cv-0106-LRH-PAL.

9 Beginning with plaintiffs' counsel, counsel,  
10 let's go ahead and start with our telephonic appearance.  
11 Please state your names for the recorded record.

12 MR. MAROULIS: Good morning, Your Honor. James  
13 Maroulis of Oracle for plaintiffs.

14 And thank you for permitting me to appear  
15 telephonically.

16 MR. HIXSON: Good morning, Your Honor. Tom  
17 Hixson with Bingham, also for plaintiffs.

18 And, likewise, thank you for allowing me to  
19 appear telephonically.

20 MR. RINGGENBERG: Kiernan Ringgenberg for the  
21 plaintiffs.

22 MR. NORTON: Fred Norton for the plaintiffs.

23 MR. POCKER: Your Honor, Richard Pocker, also  
24 for the plaintiffs.

25 MR. WEBB: Trent Webb, Shook, Hardy & Bacon, for

1 the defendants.

2 MR. RECKERS: Robert Reckers, the same.

3 THE COURT: Counsel, I have reviewed, although  
4 candidly not studied, given the volume of materials that  
5 have been submitted since our last status conference, your  
6 new motions that pertain to the preservation order and your  
7 updated status report in this case.

8 Let me hear from first counsel for plaintiffs  
9 concerning any immediate issues that need to be addressed,  
10 other than I need to give you a discovery plan and  
11 scheduling order.

12 I've read your competing proposals, and I'm  
13 familiar with what you are each asking for. But let me  
14 hear from the plaintiff concerning whether -- what your  
15 immediate needs are from the Court, in addition to  
16 resolving the issue concerning the preservation order.

17 MR. RINGGENBERG: Your Honor, in addition to the  
18 preservation order and the discovery plan, the only issue  
19 before the Court for today, I believe, is the stipulation  
20 between the parties, stipulation and order concerning  
21 communications with former employees of Oracle who are now  
22 employed by Rimini Street. And that would be the only  
23 other issue.

24 I'm prepared to address that right now, or we  
25 can defer that for later in the hearing.

1                   THE COURT: Please. I'd like to hear from that  
2 right now. Because I will tell you candidly I'm behind.

3                   MR. RINGGENBERG: I understand.

4                   THE COURT: I have a settlement conference  
5 beginning at 9:30 this morning, and it's been a very hectic  
6 week. So I'd like to spend more time reading your papers  
7 with more particularity, but I candidly haven't been able  
8 to do it with the level I have comfort and understanding  
9 what your issues are.

10                  MR. RINGGENBERG: I'll cut to the chase.

11                  THE COURT: But why don't you talk to me about  
12 that.

13                  MR. RINGGENBERG: A large number of my client's  
14 former employees work for the defendants. A number of  
15 those employees have privileged, proprietary, or otherwise  
16 confidential information.

17                  The defendants agree that the employees have  
18 such information, that defendants should not have access to  
19 such information, as a corporate entity, and they agree  
20 they should take steps to make sure that there's no  
21 disclosure of that information.

22                  Our dispute is if notwithstanding our efforts to  
23 permit disclosure of Oracle's confidential and privileged  
24 information to the defendants, if it happens anyway, what  
25 obligations do they have to tell us?

1           They say they don't have any. They appear to  
2       concede in their papers that if there is a disclosure by a  
3       former employee of privileged information, that counsel has  
4       an obligation to tell us. I don't think anybody could  
5       dispute that.

6           The case law is clear, their obligation goes  
7       beyond that. If they come into possession, whether it's  
8       deliberate or inadvertent, of unprivileged information,  
9       they have to tell us so we can do something about it.

10          The defendants can't be expected to appreciate  
11       the significance once they've -- even assuming they  
12       appreciate that it is privileged information or it's  
13       confidential information, they can't be expected to  
14       understand its significance or what's necessary to protect  
15       Oracle's rights once that happens.

16          Their sole issue of dispute is once they learn  
17       that one of their employees has, in fact, disclosed to  
18       other defendant employees or agents Oracle's privileged  
19       information, Oracle's proprietary information, they have to  
20       tell us and tell us in enough detail that we can then say,  
21       okay, here's what we need to do to remedy that situation,  
22       whatever remedy may be appropriate.

23          But we need to be in a position where we can  
24       assess the harm to Oracle and then we can work with counsel  
25       to find out what happens next.

1                   Their position is they will take care of it.  
2                   And a situation in which defense counsel and defendants are  
3                   exclusively charged with protecting Oracle's privilege is  
4                   simply not tolerable.

5                   THE COURT: Well, give me concretely what it is  
6                   that you propose.

7                   First of all, they have to recognize that  
8                   they've received privileged information. And there may be  
9                   an issue with respect to whether or not they even  
10                  appreciate that.

11                  So how do you propose to define the issue?

12                  MR. RINGGENBERG: That's fair. And so the way  
13                  that we've drafted the stipulation, which is attached to  
14                  Exhibit B to the CMC statement, is if they become aware if  
15                  there has been a disclosure. So they have to know.

16                  And we're not suggesting they have strict  
17                  liability obligation. But if they know that this has  
18                  happened, then they have an obligation to tell us what was  
19                  disclosed, who disclosed it, the time of the disclosure,  
20                  and other pertinent details, to the extent that they know  
21                  them.

22                  Now, it is certainly conceivable that there will  
23                  be such a disclosure and they won't know. But we're not  
24                  asking for anything there. All we're asking is to the  
25                  extent that they know that there has been a breach and to



1 the extent that they know who breached, what was breached,  
2 and the other pertinent details, they tell us, they tell us  
3 in a reasonable amount of time, and then we can take steps  
4 with that information.

5 We're not asking them to do anything other than  
6 that. They agree that to the extent that they know that  
7 there are such breaches that they -- and they've agreed in  
8 the stipulation, they will take steps to remedy the breach.

9 They're willing to assume that much of a burden.  
10 The burden they won't take on is to tell us. And they  
11 don't offer any justification for that refusal except they  
12 don't think they have to. They don't think they have to  
13 tell them.

14 But they understand they have an obligation to  
15 stop the breach and to do something to remedy it. They  
16 just don't want us involved. And we need to be involved.

17 THE COURT: Who will be addressing the  
18 defendants' position?

19 MR. RECKERS: I will, your Honor.

20 THE COURT: Mr. Reckers.

21 MR. RECKERS: Yes, Your Honor. I think the  
22 issue is very straightforward.

23 What we've proposed and what we've and -- our  
24 consistent position has been that we will follow any of the  
25 ethical guidelines as propounded in professional code of

1 responsibility and also the legal authority. We'll follow  
2 all of the law. Luckily, this is a hypothetical, because  
3 we're not aware of any such breaches.

4 But what Oracle has proposed as a reporting  
5 mechanism, where we give a whole set of information that's  
6 not required by the Rules of Professional Conduct --

7 THE COURT: Well, let me stop you there. And  
8 let me see if I understand your position.

9 If you had a document production and one side  
10 received the attorney-client privilege materials, for  
11 example, or clearly confidential proprietary materials and  
12 so forth, you would have a legal obligation under the rules  
13 to determine whether or not those documents had been  
14 inadvertently or accidentally produced; correct?

15 MR. RECKERS: Absolutely.

16 THE COURT: Why don't you have a similar idea to  
17 inquire or to report, in the case of former employees who  
18 are now your employees, to the other side? Why isn't it  
19 akin to an inadvertent production of privileged materials?

20 MR. RECKERS: For privilege it likely is. And  
21 our starting point is the rules. The rules are obviously  
22 written in a deliberate fashion. And they are written such  
23 that the attorney-client privilege on our side is also  
24 protected. It's very likely that we will learn about -- if  
25 we were -- if such a disclosure were to happen and we were

1 to learn about it, it would come to us through an attorney-  
2 client communication.

3 So while we certainly have the obligation to --  
4 to --

5 THE COURT: But you don't get to keep  
6 attorney-client privilege information through the  
7 attorney-client privilege.

8 MR. RECKERS: And that's exactly what the rule  
9 says. The rule says you have to give it back.

10 But what the rule doesn't go on to say is that  
11 you have to say the time, place, date, you know, the  
12 very --

13 THE COURT: Could you live with that order if it  
14 was not limited to attorney -- if it did not require a  
15 disclosure of the attorneys ascertaining, even if -- the  
16 information?

17 In other words, if the information has been  
18 disclosed to co- -- what they're worried about is who knows  
19 their privileged material.

20 MR. RECKERS: Right. So we're happy to make the  
21 disclosure that's required by the professional rules.  
22 We're happy to let them know that we have the information  
23 if it's tangible, that we can return it, we'll return it.  
24 I think that's clearly dicta -- that's not the dispute.  
25 The dispute is the other reporting obligations, where it

1 came from.

2 And where this comes up probably -- you know, we  
3 only know of one individual who has privileged information.  
4 There may be others, but we know of one. She's very aware  
5 of her obligation not to disclose that privileged  
6 information to us.

7 Counsel -- we're aware. I mean, everyone is  
8 very aware.

9 So I think it's not very likely that she's going  
10 to come into one of our offices or tell us something.

11 I think the real risk is if one of former Oracle  
12 employees were to disclose arguably proprietary information  
13 that they had from their other company and that that came  
14 to us, that's a different -- that's a different legal  
15 analysis, what we have to do in that case.

16 We agree that we can't use the information. We  
17 also agree that if we have a document that we shouldn't  
18 have, we have to give it back.

19 But the other information to the time, place,  
20 date, person, we don't see any authority that we would have  
21 to -- that we would have to provide the information that's  
22 requested.

23 And, in particular, we also have the obligation,  
24 the competing obligation under the rules of professional  
25 responsibility, to maintain the confidence of an

1 attorney-client privilege.

2 So that's the disconnect. It's not really that  
3 we don't want to. There are competing rules and principles  
4 that are in play here. And that's why the rule of  
5 disclosure, I would suggest, is so narrowly tailored to --  
6 simply to return the information and not the broader  
7 reporting that Oracle is --

8 THE COURT: Right. And let me test then --  
9 first of all, have you attached your former proposed  
10 stipulation as well?

11 MR. RECKERS: Yes, Your Honor. And what we've  
12 done is we have one -- we have one draft. And there's only  
13 one sentence. And it's submitted with the joint statement.  
14 And it's in bold so either you --

15 THE COURT: Okay. That's.

16 MR. RECKERS: -- accept ours --

17 THE COURT: -- what I thought is that you were  
18 in agreement with everything except this one issue, and  
19 you've identified what language you can live with and what  
20 language you can't.

21 MR. RECKERS: And that's right. And we've  
22 agreed to, you know, the interview process where we've  
23 allowed Oracle's attorneys to sit in on our conversations  
24 that might touch on confidential or arguably privileged  
25 information.

1                   We've agreed to send a notice to our employees  
2                   addressing these issues.

3                   We've agreed, of course, that we can't use the  
4                   information if we were to --

5                   THE COURT: All right. Let me then just test  
6                   because their concern is disclosing, knowing whether or not  
7                   their information has been disclosed.

8                   Employee A comes to you, and your discussions  
9                   with employee A are covered by the attorney-client  
10                  privilege because you're trying to learn about your  
11                  client's position in connection with this litigation.

12                  However, during the course of that  
13                  communication, employee A says, I told employees B, C, and  
14                  E information that's privileged to the other side in this  
15                  case.

16                  What, if any, disclosure obligations do you  
17                  claim you have?

18                  MR. RECKERS: Other than look at -- we cite the  
19                  rules, and they cite the rules, as well, and it appears  
20                  that verbal communication like that the rules are silent as  
21                  to what needs to be disclosed to the other side.

22                  THE COURT: And that's where your dispute is,  
23                  isn't it? I mean --

24                  MR. RECKERS: Well --

25                  THE COURT: Counsel --

1 MR. RECKERS: It -- that --

2 THE COURT: -- do you really -- you're not  
3 claiming that they have to disclose to you the content of  
4 the communication with an employee of their client who is  
5 communicating with them in an attorney-client privilege  
6 situation, do you?

7 MR. RINGGENBERG: We would not pretend that they  
8 have to disclose the communication. The privilege does not  
9 protect facts.

10 So in the Court's hypothetical, I told employees  
11 B, C, and E, that's not privileged. The communication with  
12 the attorney is privileged. The facts are not. So what  
13 they told the lawyer, we have some concern about that.

14 But I don't know how we can deal with the  
15 privilege problem in a stipulation.

16 THE COURT: Right.

17 MR. RINGGENBERG: So if the employees come --

18 THE COURT: And that's why I'm trying to find  
19 out the outer markers of your respective positions because  
20 I think I appreciate now -- Mr. Reckers, I absolutely  
21 appreciate the observation that attorney-client  
22 communications are protected from disclosures. Facts that  
23 you learn from an employee are not protected from  
24 disclosure.

25 And if you learn in an attorney-client protected

1 conversation that an employee has disclosed privileged  
2 information from the other side, your position is you're  
3 not required to disclose that to the other side?

4 MR. RECKERS: That's a privilege. For privilege  
5 I think there is a more -- that the law refunds a broader  
6 obligation. So if we have privileged information, I think  
7 we would report the privileged information that we had.  
8 The fact that it -- whatever that would be, again, I think  
9 it's --

10 THE COURT: But who is "we," for purposes of  
11 your answer?

12 MR. RECKERS: Counsel for Rimini.

13 THE COURT: But the issue is whether or not the  
14 employee has disclosed to others, other than counsel.

15 You know your ethical obligations, and you know  
16 the repercussions of violating those ethical obligations.  
17 However, the essence of the communication and who else has  
18 received privileged information is something that your  
19 adversary -- or you would want to know, for example, if it  
20 was occurring --

21 MR. RECKERS: I -- I --

22 THE COURT: -- to you as well.

23 MR. RECKERS: And so let me sort of broaden my  
24 statement since I was suggesting perhaps a different  
25 hypothetical.



1                   Certainly if we learn that there's any  
2 disclosure of privileged information, I think it is  
3 reflected in the rules, that's really not part of the  
4 dispute here, that there would be a disclosure to the other  
5 side of -- disclosure to the other side of the improper  
6 disclosure of the -- their attorney-client --

7                   THE COURT: And the scope of that improper  
8 disclosure?

9                   MR. RECKERS: I would think so. I would think  
10 so.

11                   Again, our position is that we're going to  
12 follow -- when this hypothetical overcomes the past, we'll  
13 follow our ethical obligations. I think there are special  
14 rules, as Your Honor suggests, there are special rules to  
15 protect privileged communications.

16                   But the proposed stipulation goes beyond that to  
17 protect their contractual obligations for proprietary  
18 information that they have with their former employees. We  
19 can -- we have not seen anything in the case law or the  
20 code of professional responsibility that would require us  
21 to report those types of disclosures, we can't use it,  
22 we -- if it's a document we have to give it back.

23                   But still it's not our process -- it's not the  
24 process of the federal rules to have us report on misdeeds  
25 of our employees; in fact, we have a formal process where

1 they can learn from their discovery, if it's otherwise  
2 relevant, to the -- for the proprietary information. It's  
3 two different --

4 THE COURT: Right. I think I have a handle on  
5 your respective positions. I'll take a look at the -- and  
6 read over the stipulation in detail and enter an order  
7 resolving the dispute one way or the other. Okay?

8 MR. RINGGENBERG: I'm sorry, Your Honor. If I  
9 could just make one observation --

10 THE COURT: Yes, sir.

11 MR. RINGGENBERG: -- in response to the last  
12 question.

13 While Mr. Reckers' communications with his  
14 clients are privileged, the information that one would  
15 normally put on a privilege log, that is I spoke to my  
16 client, general -- very general description of the subject  
17 matter and the time and date as the information is  
18 routinely disclosed, and if so, if there is that much  
19 information, at the very least we would still be within the  
20 ambit of what we would want to know and what we would be  
21 entitled to.

22 THE COURT: All right. Let's move on to the  
23 issue concerning the request for a preservation order and  
24 forensic copy.

25 And if I understand correctly, what you're

1 asking for, forensic copy and a mirror image would be  
2 synonymous terms, Mr. --

3 MR. RINGGENBERG: Yes, Your Honor. That's  
4 correct.

5 THE COURT: All right. And, Mr. Ringgenberg, if  
6 you will address your client's position with respect to  
7 this.

8 I've read the moving and responsive papers, the  
9 dueling going back and forth. You tell me, and your expert  
10 tells me, it takes a couple hundred dollars, several  
11 hundred dollars and two hours per computer, and you're  
12 asking for 30 records custodians.

13 The other side says we have potentially 200  
14 computers that are issued, it would be extremely disruptive  
15 and will cost \$200,000 and you can have it but you have to  
16 pay for it.

17 MR. RINGGENBERG: That's a precise description  
18 of the bid and ask, Your Honor.

19 Let me make four brief points. I know Your  
20 Honor is pressed for time.

21 The first is that this information is crucial.  
22 The information on Rimini --

23 THE COURT: And yet you didn't ask for it until  
24 two days before the motion was filed. You sent a  
25 13-page -- or a 13-page category request for preservation

1 after the lawsuit was filed, but it didn't include IMs, and  
2 it didn't include the server logs that you are now asking  
3 for.

4 MR. RINGGENBERG: The -- Your Honor, there's at  
5 least three times when we've explained to Rimini their need  
6 to preserve relevant information, including --

7 THE COURT: That --

8 MR. RINGGENBERG: -- information subject --

9 THE COURT: That --

10 MR. RINGGENBERG: -- to this motion.

11 THE COURT: Okay.

12 MR. RINGGENBERG: And if I could please --

13 THE COURT: Sure.

14 MR. RINGGENBERG: -- explain?

15 THE COURT: I'm sorry.

16 MR. RINGGENBERG: The most specific, three days  
17 after this case was filed, we sent a letter broadly  
18 describing issues and suggested the parties meet and confer  
19 about exactly what they should do.

20 Our goal was to reach a stipulation so that  
21 Oracle can precisely describe its own preservation duties  
22 and everyone can come to agreement, and we can do the same  
23 for Rimini Street's.

24 Rimini Street did not care to engage with us on  
25 that. And as a result what happened is we didn't know what

1 they were doing until they sat for a 30(b)(6) deposition.

2 But within a month or six weeks of this  
3 litigation being filed, Your Honor, we sent them the list  
4 of items that described with particularity what we thought  
5 they had to preserve. And one was all communications among  
6 Rimini Street employees regarding copying and downloading  
7 of Oracle software.

8 And we believe that clearly encompasses the  
9 instant messages that are the subject of our motion.

10 THE COURT: It didn't say instant messages, but  
11 it means the same thing?

12 MR. RINGGENBERG: Well, it is a communication.  
13 And our view, Your Honor, is that Rimini Street knows how  
14 its employees communicate. Its own documents demonstrate  
15 that this is an important tool that they use for their  
16 business.

17 And obviously if the lawyers are speaking with  
18 the employees, they're going to ask them what they used to  
19 communicate, and they're going to find out.

20 And on the basis of all that information, they  
21 should have known the instant messages, as well as all  
22 their communications, had relevant information and should  
23 have been preserved.

24 If the test were that we had to identify,  
25 without knowing the details of their systems, every type --

1 every scrap of paper and every type of document they had to  
2 preserve, you know, that's not a workable standard  
3 because --

4 THE COURT: Understandable. But, on the other  
5 hand, the -- the cases and the authors that address the  
6 electronic discovery issues do say that fragmented  
7 information and transitory information, or ephemeral  
8 information, is treated differently than documentation or  
9 electronic data that is stored in the ordinary course of  
10 business.

11 MR. RINGGENBERG: That is correct.

12 THE COURT: And they've countered saying we have  
13 all of these -- you know, to assure you that they're not  
14 deleting things, they don't have a document destruction  
15 policy, they don't have a policy in which mailboxes are  
16 limited to certain amount of data and it automatically gets  
17 dumped out and so forth.

18 So what they're suggesting is the cost of what  
19 you are requesting outweighs its likely benefit, given  
20 their preservation policies.

21 MR. RINGGENBERG: Correct. And let me explain  
22 why -- why that's not the case, Your Honor, is the evidence  
23 that's subject to this motion is evidence that lives on  
24 individual employee's hard drives.

25 None of the preservation measures that are in

1 any way automatic -- the only preservation measures they've  
2 even suggested that apply to that particular data depend  
3 entirely on the discretion of the individual employees.

4 That is to say, individual employees decide,  
5 without any guidance, whether documents in the ordinary  
6 course are kept or destroyed. Rimini Street says they  
7 don't have a document destruction policy. Fair enough.  
8 They also don't have a document retention policy; meaning  
9 every employee, setting aside the litigation hold, decides  
10 what to keep and what to throw away.

11 And in that situation, Your Honor --

12 THE COURT: With guidance from the lawyers that  
13 say this is what you're obligated to keep.

14 MR. RINGGENBERG: Well, after the litigation has  
15 begun, such direction was provided. But for the year and a  
16 half, when Rimini Street was on notice that this litigation  
17 was coming, when they were telling the United States  
18 District Court for the District of Nevada that Oracle was  
19 planning litigation against them, during that time period  
20 no such direction was provided.

21 As a result, employees in that time period were  
22 not told that they were required to keep the information.  
23 I will say there is -- in the fall of '09, they received a  
24 third-party subpoena, and we learned in their opposition  
25 that they issued some kind of notice in connection with

1 that. Fair enough. But it's very circumscribed in scope  
2 because the subpoena's very circumscribed in scope.

3 We've attached it. The information it requests  
4 Rimini Street is documents sufficient to show three  
5 specific things.

6 And so certainly with regard to -- other than  
7 that very narrow litigation hold notice, they've conceded  
8 that as to information on employee hard drives there is  
9 nothing that they did until this litigation was filed,  
10 despite being on notice of it for at least 18 months in  
11 advance.

12 THE COURT: All right. Have you identified the  
13 key custodians? Because they tell me that from the start  
14 they have been amenable to some limited forensic freezing  
15 or mirror imaging.

16 MR. RINGGENBERG: Well --

17 THE COURT: But you didn't respond to that.

18 MR. RINGGENBERG: Well, Your Honor, what they've  
19 said is, "We won't do it unless we pay."

20 And Oracle does not -- we believe it's not  
21 appropriate that Oracle should have to pay for Rimini  
22 Street's preservation efforts.

23 Oracle has invested a great deal of time and  
24 resources in preserving its own data, preparing 200 -- at  
25 least approximately 200 forensic images of its own



1 employees' hard drives at significant expense and trouble.  
2 And we believed if Rimini Street had taken appropriate  
3 preservation measures, when they were on notice of this  
4 litigation and after the litigation was filed, forensic  
5 images may not have been necessary.

6 But because they delayed, despite being on  
7 notice of the litigation, and because they have failed to  
8 take anything beyond relying on employees' discretion as to  
9 the great deal of employees, that's what gives the --

10 THE COURT: And yet --

11 MR. RINGGENBERG: -- need --

12 THE COURT: -- you acknowledge that the issue  
13 right now is freezing what they have because once you find  
14 out, if I order the mirror images, the content of that,  
15 then you may not want to look at it all.

16 MR. RINGGENBERG: It's correct. And let me be  
17 very clear about this, Your Honor. And let me use instant  
18 message --

19 THE COURT: Because that's the biggest -- the  
20 cost is not in freezing it as much as it is in reviewing it  
21 and producing it or developing a protocol for determining  
22 what within the mirror images should be produced.

23 MR. RINGGENBERG: That's correct. And let me  
24 use instant messages as a very concrete example of what our  
25 concern is and how we think this ought to work.

1           It's conceded that Rimini Street did not direct  
2           its employees to archive instant messages until August of  
3           2010.

4           We know the instant messages in this case on the  
5           tool that they use are not ephemeral. The -- Mr. Mattal's  
6           declaration explains that he reviewed their specific tool  
7           that they use, which is publicly available, in its -- in  
8           its default setting it saves a file on each computer's hard  
9           drive preserving instant messages that that employee makes.

10           It's just that they're deleted automatically  
11           whenever that user logs out. So they exist, and then  
12           they're gone. If they'd just taken the time to check a box  
13           that said archive these, they're not deleted at the end --  
14           end of the logoff session, they're preserved.

15           THE COURT: And that was the issue in which your  
16           30(b)(6) -- the 30(b)(6) deponent was mistaken during his  
17           deposition?

18           MR. RINGGENBERG: No. He testified accurately  
19           on this.

20           THE COURT: Okay.

21           MR. RINGGENBERG: He said employees have not  
22           been instructed to archive them.

23           And I said, "Well, what about your computer? Do  
24           you use IM?"

25           He said, "Every day."

1                   And I says, "Is archive enabled in your  
2 computer?"

3                   And he said, "Absolutely not."

4                   And that's when we discovered. And the next day  
5 we said, "Look, guys, this is a big problem. We need to  
6 preserve this."

7                   And that specifically -- of course, they'd been  
8 encompassed in our general notices.

9                   So as a result, those files existed and were  
10 deleted in the ordinary course every day -- or at least  
11 whenever the employee logged off, up until August 2010.

12                  Those files still remain on those employees'  
13 hard drives. Now, you can't see them ordinarily, but a  
14 skilled technician can pull them off. At least in most  
15 instances.

16                  But over time, as the hard drive is used, it  
17 becomes more and more difficult to obtain them because  
18 additional information --

19                  THE COURT: I understand. Because they get  
20 overwritten.

21                  MR. RINGGENBERG: That's right. And all we're  
22 asking on this motion is to preserve the -- for the  
23 custodians that both parties agree should be subject to  
24 producing --

25                  THE COURT: And have you --

1 MR. RINGGENBERG: -- documents in this case --

2 THE COURT: -- reached that agreement now?

3 MR. RINGGENBERG: They proposes 30, we proposed  
4 60, and we're negotiating. But that's the bid and ask.  
5 And I suspect that we'll come to closure on that in the  
6 near future.

7 But 60 would be the cap of what we're asking,  
8 which substantially drops the cost, obviously.

9 And so if we freeze those images, then later on,  
10 if we discover that they contain crucial information that's  
11 not otherwise available, then we can go and do the  
12 analysis necessary to get them.

13 THE COURT: And how do you propose to discover  
14 whether they contain crucial information that's not  
15 otherwise available without looking at it?

16 MR. RINGGENBERG: Well, because we'll note --  
17 well, we won't know what's in those files. But what we  
18 will note is what else we get from Rimini Street in  
19 discovery.

20 And so if there are holes or if we discover  
21 leaks or if we discover suspicious activity or if we  
22 discover just there's entire time periods where information  
23 is missing, then we have a very good reason to simply come  
24 in and ask for -- that their forensic analysis be prepared  
25 on some portion of the information.

1           But, Your Honor, if this information is not  
2           preserved now and in short order, that won't be possible  
3           later.

4           Now, of course, we could file --

5           THE COURT: So you're doing this as -- basically  
6           as a double check. Because if you get the discovery from  
7           the other side in this case and you don't have concerns  
8           about the completion -- the completeness of the data, then  
9           you may never ask for the forensic review or re-creation of  
10          the data that's captured?

11          MR. RINGGENBERG: Exactly. And that's exactly,  
12          Your Honor, why Oracle created forensic images of 200 of  
13          its own computers is so that --

14          THE COURT: Because you don't intend to do that  
15          yourself either?

16          MR. RINGGENBERG: I'm sorry?

17          THE COURT: You don't intend to do that either  
18          for purposes of discovery?

19          MR. RINGGENBERG: Correct. But if we discover a  
20          mistake, if something -- if something has gone missing,  
21          then that's there as a backup, and so that will -- it is  
22          true that we could just wait until the end of the case and  
23          file a sanctions motion, Your Honor.

24          But we believe it's our duty to bring this to  
25          the Court's attention so that judicial process is more

1       likely to be accurate.

2                   And let me make one other point, Your Honor. We  
3       have a specific cause to be concerned that employees in  
4       this case will conceal illicit activity because we have  
5       evidence that they've done it before.

6                   THE COURT: I have read your papers. I know  
7       that you're concerned about the instant messaging and so  
8       forth.

9                   MR. RINGGENBERG: And that's just one example.  
10      That's what -- the proof we have. Of course it'd go  
11      broader than that. And so that's why we think it's  
12      important.

13                   One more point about the cost, Your Honor, is if  
14      the Court were to determine cost shifting is appropriate in  
15      some measure, one concern we have is if Oracle's footing  
16      the bill but has no control over the process, then the  
17      incentives for keeping costs down and not in place. So  
18      if -- if the Court --

19                   THE COURT: Yeah, it depends on who you really  
20      trust. Does your expert -- can you get it done a lot  
21      cheaper than they can?

22                   MR. RINGGENBERG: Our expert identified a means  
23      by which this can be done much more efficiently than the  
24      bids that they obtained. And I'll tell you exactly how.

25                   Rimini Street's employees are located all over

1 the country. They mostly work remotely. Their bids  
2 require the technician to fly to -- you know, from hither  
3 and yon to prepare forensic images.

4 Our expert explained that especially for  
5 individuals who are technically savvy, which, of course,  
6 Rimini Street's employees, are software developers and  
7 technical support folks, you can send them a hard drive in  
8 the mail, attach it to the computer. The technician can  
9 connect over the Internet, prepare the process overnight so  
10 it doesn't interfere with the person's working hours. And  
11 then all of that can be done without the expense of a plane  
12 ticket or hotel room.

13 Half of their expense in their bids is dedicated  
14 to plane tickets, hotel rooms, and rental cars --

15 THE COURT: And --

16 MR. RINGGENBERG: That can be avoided.

17 THE COURT: And if those costs were avoided,  
18 you're not going to complain that the employees may have  
19 improperly copied the data? Because that's what the  
20 counter --

21 MR. RINGGENBERG: We would not say that it's  
22 improper to do it remotely, of course, Your Honor. I don't  
23 know what they're going to do, so I can't swear that their  
24 process is going to be correct.

25 But certainly as to that, we would not say it's

1 improper to do it remotely. Because we suggested it, Your  
2 Honor. Absolutely.

3 THE COURT: All right. Let me hear the opposing  
4 view.

5 MR. WEBB: I'll be very brief, Your Honor. I  
6 know you're late already.

7 If this case becomes war of attrition we will  
8 lose. There is zero doubt about it. This issue goes not  
9 only to the schedule and managing this case closely so it  
10 doesn't happen, but this is a concrete example.

11 If they want this stuff, just pay for it. You  
12 can have it. And we've said that repeatedly. This isn't  
13 an issue about them preserving, it's an issue about us  
14 having to pay for it.

15 Now, listen, we want to get to the merits on  
16 this case. They've said some stuff about our client and  
17 about Mr. Ravin. We just want to clear the air and have  
18 this case decided on its merits. And all we want is a  
19 process and a schedule that allows us to stay a viable  
20 company to get to that point so we can fight on the merits.

21 And so this is a concrete example. And  
22 listen -- Judge, I can't predict the future, but I will  
23 predict there will be a discovery motion filed by these  
24 guys, one or more, I just don't know what (indiscernible),  
25 because that is going to be a litigation within a



1 litigation, just as the process that's already before you  
2 is illustrating this is going to become a problem.

3 And this is why we just ask the Court to tightly  
4 control this. Give parties -- give everybody strict rules  
5 and make us follow them. Don't let this become the  
6 litigation within the litigation. Because, once again,  
7 we've already suffered because of this lawsuit and the  
8 marked communications going on about this lawsuit.

9 If we now have to deal with paying \$200,000 to  
10 give them something that we don't think they need -- and  
11 where does it end? And we have depositions. And we saw  
12 what happened in the SAP case with two multi-billion dollar  
13 companies with unlimited resources battling each other. We  
14 don't have that here.

15 We're a small company with finite resources.  
16 And they're being stretched already, starving.

17 So all I ask is that for this issue and the  
18 schedule the Court look at this very closely and say we're  
19 going to do what is necessary. These guys have already  
20 kicked the tires on this TomorrowNow stuff. They're going  
21 to trial in November. They know exactly what to look for.  
22 I would hope they don't have to reinvent the wheel all over  
23 again in this case. Tell us what they want; we'll give  
24 it.

25 We've got (indiscernible) that were around at

1 least as early as May of 2009. Listen, we knew this was  
2 going to be an issue. We knew this was going to be  
3 something they teed up. We've done everything we can. We  
4 shouldn't have to pay for their -- for something they don't  
5 need. Thank you.

6 THE COURT: The motion is granted to the extent  
7 that the plaintiffs may designate the custodian for whom  
8 they request mirror images of computers and have mirror  
9 images prepared at plaintiffs' cost. Okay.

10 And so I'll direct the parties to meet and  
11 confer to identify those custodians. You're apart between  
12 30 and 60. Identify those. You really need them, you pay  
13 for them.

14 You don't need them and you think they've  
15 destroyed something, that's another issue for another day;  
16 if you just determine their documents are incomplete, then  
17 what consequences should flow from that.

18 MR. WEBB: Thank you, Your Honor.

19 THE COURT: All right. With respect to the  
20 schedule, I'm going to enter a discovery plan and  
21 scheduling order. I'm going to limit depositions to 20  
22 depositions of seven hours duration unless for good cause  
23 shown. Discovery is inadequate in order for you to  
24 complete this case.

25 I'm going to limit interrogatories in number to

1 40. You haven't requested a limitation on request for  
2 production. None will be imposed.

3 I'm going to impose a 12-month fact discovery  
4 cutoff and a four-month expert discovery cutoff. And I'll  
5 enter a written order that establishes those precise  
6 deadlines.

7 So we'll go from there. And then I will enter  
8 an order resolving your stipulation concerning the employee  
9 contact issue as soon as I've been able to go back and read  
10 in more detail your respective positions.

11 So at this point do either side believe that  
12 further status conferences are required? Or do you want to  
13 rely upon the ordinary method of resolving disputes, as if  
14 they exist, you file a motion, response, brief, et cetera?

15 Counsel for plaintiffs?

16 MR. RINGGENBERG: I would suggest that we --  
17 although we do not need a status conference in 30 days,  
18 that we be back no later than 75 days from now, not  
19 thinking about where that date falls, so we can inform the  
20 Court about how much progress we're making with the  
21 discovery we have.

22 I understand the Court's order. I note that the  
23 Court has ordered less discovery than even plaintiffs --  
24 I'm sorry, than even defendants propose. And so I  
25 suspect --

1           THE COURT: I understand. So it requires you to  
2 both be as efficient as possible and doesn't foreclose the  
3 possibility that I'll give you more. But you're going to  
4 have to -- the party requesting more than that is going to  
5 have to show good cause for it.

6           MR. RINGGENBERG: And understanding that, I  
7 suggest that we set a time now because I do anticipate that  
8 we will have to come back and discuss with the Court again  
9 what further we need.

10          THE COURT: That's fine.

11          Mr. Webb?

12          MR. WEBB: I tend to think we can get along a  
13 little better than that. But we're fine with that, Your  
14 Honor.

15          THE COURT: All right. I'll set a status  
16 conference in 75 days on your progress in meeting discovery  
17 plan and scheduling order deadlines.

18          And let me tell you, counsel, I'll consider  
19 individual tweaks or adjustments. You attempt to schedule  
20 a witness you can't get it done for reasons that one or  
21 both sides are unavailable, the witness is unavailable,  
22 that's one thing. But wholesale extensions of the  
23 discovery plan and scheduling order, I'm not inclined to  
24 allow you.

25          So do the absolute best you can to start talking

1 to one other. Litigation does not have to be crushing to  
2 both sides. It can be. So there are a lot of reasons why  
3 you should try to cooperate on things that are mutually  
4 advantageous. But if you can't, that's what I get paid the  
5 big bucks to decide.

6 Mr. Miller, would you give me a 75-day status  
7 conference, please.

8 COURTROOM ADMINISTRATOR: Yes, Your Honor. As  
9 75 days actually falls right on the Thanksgiving holiday,  
10 we'll go ahead and set this matter for Tuesday, November  
11 the 30th, 2010, at 9:00 a.m., in this courtroom.

12 THE COURT: All right.

13 And then if you will, please, give me a joint  
14 status report the Friday before, which tells me where you  
15 are, whether there are any impediments, and whether either  
16 side is requesting any adjustments to the discovery plan  
17 and scheduling order deadlines.

18 Thank you, folks. Good day.

19 MR. WEBB: Thank you, Your Honor.

20 MR. RINGGENBERG: Thank you, Your Honor.

21 (The proceedings concluded at 9:44 a.m.)

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I certify that the foregoing is a correct  
transcript from the electronic sound recording  
of the proceedings in the above-entitled matter.



11/22/16

Donna Davidson

Date